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2
3 UNITED STATES DISTRICT COURT
4 EASTERN DISTRICT OF WASHINGTON
5

6 KAY S.E. CUSTER,)
7 Plaintiff,) No. CV-10-366-JPH
8 v.) ORDER GRANTING DEFENDANT'S
9 MICHAEL J. ASTRUE, Commissioner) MOTION FOR SUMMARY JUDGMENT
10 of Social Security,)
11 Defendant.)
12

13 BEFORE THE COURT are cross-motions for summary judgment noted
14 for hearing without oral argument on February 10, 2012 (ECF Nos.
15 9, 12). Attorney Kenneth Isserlis represents Plaintiff; Special
16 Assistant United States Attorney Leisa A. Wolf represents the
17 Commissioner of Social Security (Defendant). On June 27, 2011,
18 Plaintiff filed a reply (ECF No. 14). The parties consented to
19 proceed before a magistrate judge (ECF No. 4). After reviewing the
20 administrative record and the briefs filed by the parties, the
21 court **grants** Defendant's Motion for Summary Judgment (ECF No. 12).

22 **JURISDICTION**

23 Plaintiff concurrently filed applications for disability
24 insurance benefits (DIB) and supplemental security income (SSI) on
25 July 31, 2006, alleging disability as of March 8, 2005 (Tr. 149-
26 153, 154-156, respectively). The applications were denied
27 initially and on reconsideration (Tr. 109-113, 115-119).
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1 At a continued hearing¹ before Administrative Law Judge (ALJ)
2 Joel B. Martinez on December 10, 2008, Plaintiff, represented by
3 counsel, testified. Plaintiff's mother, and medical and vocational
4 experts, also testified (Tr. 53-106). On February 4, 2009, the ALJ
5 issued an unfavorable decision (Tr. 25-33). The Appeals Council
6 denied Plaintiff's request for review on August 20, 2010 (Tr. 1-
7 3). Therefore, the ALJ's decision became the final decision of the
8 Commissioner, which is appealable to the district court pursuant
9 to 42 U.S.C. § 405(g). Plaintiff filed this action for judicial
10 review on October 19, 2010 (ECF No. 1).

11 **STATEMENT OF FACTS**

12 The facts have been presented in the administrative hearing
13 transcript, the ALJ's decision, the briefs of both parties, and
14 are only briefly summarized here.

15 Plaintiff was 42 years old at onset and 46 at the hearing
16 (Tr. 54). She earned a GED and has worked as a certified nurse's
17 aide and child monitor (Tr. 33, 54). She is divorced and lives
18 with her parents. She does not have a driver's license due to
19 unpaid tickets (Tr. 55). Ms. Custer last worked in June or July of
20 2005 (Tr. 57).

21 Plaintiff cannot work because she suffers from migraines,
22 radiating back pain, and medication side effects, problems she has
23 has experienced for about five years (Tr. 62). She briefly tried
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26 A hearing on April 25, 2008, was continued so claimant could
27 obtain counsel (Tr. 45-46). An October 10, 2008, hearing was
28 continued to obtain expert medical testimony (Tr. 49-50).

1 physical therapy but it was unsuccessful. She has not had surgery
2 or injections for back pain. She takes prescribed pain medication,
3 a muscle relaxer, and an antidepressant (Tr. 71, 76). Ms. Custer
4 sees a doctor monthly for medication management. She also sees Dr.
5 Lee every three months, although she missed the last two
6 appointments due to transportation problems. She has seen Dr. Lee
7 for about two and a half years (Tr. 63-65). Plaintiff has had no
8 mental health treatment (other than medication) because of
9 insurance and transportation problems. Ms. Custer had a driver's
10 license but lost it, apparently due to unpaid tickets (Tr. 55, 63-
11 66, 76).

12 She uses a cane for balance when walking but admits it was
13 not prescribed (Tr. 66). Plaintiff testified she can sit for 30
14 minutes, walk for 5 minutes, and stand for 15-20 minutes (Tr. 67).
15 When she lays on her back, her "whole left side from my hip down
16 goes numb." If she writes too much, her hands become swollen and
17 numb. She drops things a lot (Tr. 72-73). She reads about an hour
18 and a half a day, watches movies, performs water aerobics twice a
19 week for ten minutes at a time, dusts her room a little, and sits
20 down to cook (Tr. 69-70). Six months ago she began leading a bible
21 study group of seven people and herself. They meet weekly for an
22 hour at her home or nearby (Tr. 76-77).

23 SEQUENTIAL EVALUATION PROCESS

24 The Social Security Act (the Act) defines disability
25 as the "inability to engage in any substantial gainful activity by
26 reason of any medically determinable physical or mental impairment
27 which can be expected to result in death or which has lasted or
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1 can be expected to last for a continuous period of not less than
2 twelve months." 42 U.S.C. §§ 423(d)(1)(A), 1382c(a)(3)(A). The Act
3 also provides that a Plaintiff shall be determined to be under a
4 disability only if any impairments are of such severity that a
5 plaintiff is not only unable to do previous work but cannot,
6 considering plaintiff's age, education and work experiences,
7 engage in any other substantial gainful work which exists in the
8 national economy. 42 U.S.C. §§ 423(d)(2)(A), 1382c(a)(3)(B).
9 Thus, the definition of disability consists of both medical and
10 vocational components. *Edlund v. Massanari*, 253 F.3d 1152, 1156
11 (9th Cir.2001).

12 The Commissioner has established a five-step sequential
13 evaluation process for determining whether a person is disabled.
14 20 C.F.R. §§ 404.1520, 416.920. Step one determines if the person
15 is engaged in substantial gainful activities. If so, benefits are
16 denied. 20 C.F.R. §§ 404.1520(a)(4)(I), 416.920(a)(4)(I). If not,
17 the decision maker proceeds to step two, which determines whether
18 plaintiff has a medically severe impairment or combination of
19 impairments. 20 C.F.R. §§ 404.1520(a)(4)(ii), 416.920(a)(4)(ii).

20 If plaintiff does not have a severe impairment or combination
21 of impairments, the disability claim is denied. If the impairment
22 is severe, the evaluation proceeds to the third step, which
23 compares plaintiff's impairment with a number of listed
24 impairments acknowledged by the Commissioner to be so severe as to
25 preclude substantial gainful activity. 20 C.F.R. §§
26 404.1520(a)(4)(ii), 416.920(a)(4)(ii); 20 C.F.R. § 404 Subpt. P
27 App. 1. If the impairment meets or equals one of the listed
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1 impairments, plaintiff is conclusively presumed to be disabled.
2 If the impairment is not one conclusively presumed to be
3 disabling, the evaluation proceeds to the fourth step, which
4 determines whether the impairment prevents plaintiff from
5 performing work which was performed in the past. If a plaintiff is
6 able to perform previous work, that Plaintiff is deemed not
7 disabled. 20 C.F.R. §§ 404.1520(a)(4)(iv), 416.920(a)(4)(iv). At
8 this step, plaintiff's residual functional capacity (RFC)
9 assessment is considered. If plaintiff cannot perform this work,
10 the fifth and final step in the process determines whether
11 plaintiff is able to perform other work in the national economy in
12 view of plaintiff's residual functional capacity, age, education
13 and past work experience. 20 C.F.R. §§ 404.1520(a)(4)(v),
14 416.920(a)(4)(v); *Bowen v. Yuckert*, 482 U.S. 137 (1987).

15 The initial burden of proof rests upon plaintiff to establish
16 a *prima facie* case of entitlement to disability benefits.
17 *Rhinehart v. Finch*, 438 F.2d 920, 921 (9th Cir.1971); *Meanel v.*
18 *Apfel*, 172 F.3d 1111, 1113 (9th Cir.1999). The initial burden is
19 met once plaintiff establishes that a physical or mental
20 impairment prevents the performance of previous work. The burden
21 then shifts, at step five, to the Commissioner to show that (1)
22 plaintiff can perform other substantial gainful activity and (2) a
23 "significant number of jobs exist in the national economy" which
24 plaintiff can perform. *Kail v. Heckler*, 722 F.2d 1496, 1498 (9th
25 Cir.1984).

26 STANDARD OF REVIEW

27 Congress has provided a limited scope of judicial review of a
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1 Commissioner's decision. 42 U.S.C. § 405(g). A Court must uphold
2 the Commissioner's decision, made through an ALJ, when the
3 determination is not based on legal error and is supported by
4 substantial evidence. *See Jones v. Heckler*, 760 F.2d 993, 995 (9th
5 Cir.1985); *Tackett v. Apfel*, 180 F.3d 1094, 1097 (9th Cir.1999).
6 "The [Commissioner's] determination that a plaintiff is not
7 disabled will be upheld if the findings of fact are supported by
8 substantial evidence." *Delgado v. Heckler*, 722 F.2d 570, 572 (9th
9 Cir.1983)(citing 42 U.S.C. § 405(g)). Substantial evidence is more
10 than a mere scintilla, *Sorenson v. Weinberger*, 514 F.2d 1112, 1119
11 n. 10 (9th Cir. 1975), but less than a preponderance. *McAllister*
12 *v. Sullivan*, 888 F.2d 599, 601-602 (9th Cir.1989); *Desrosiers v.*
13 *Secretary of Health and Human Services*, 846 F.2d 573, 576 (9th
14 Cir.1988). Substantial evidence "means such evidence as a
15 reasonable mind might accept as adequate to support a conclusion."
16 *Richardson v. Perales*, 402 U.S. 389, 401 (1971)(citations
17 omitted). "[S]uch inferences and conclusions as the [Commissioner]
18 may reasonably draw from the evidence" will also be upheld. *Mark*
19 *v. Celebrezze*, 348 F.2d 289, 293 (9th Cir.1965). On review, the
20 Court considers the record as a whole, not just the evidence
21 supporting the decision of the Commissioner. *Weetman v. Sullivan*,
22 877 F.2d 20, 22 (9th Cir.1989)(quoting *Kornock v. Harris*, 648 F.2d
23 525, 526 (9th Cir.1980)).

24 It is the role of the trier of fact, not this Court, to
25 resolve conflicts in evidence. *Richardson*, 402 U.S. at 400. If
26 evidence supports more than one rational interpretation, the Court
27 may not substitute its judgment for that of the Commissioner.

1 *Tackett*, 180 F.3d at 1097; *Allen v. Heckler*, 749 F.2d 577, 579
2 (9th Cir.1984). Nevertheless, a decision supported by substantial
3 evidence will still be set aside if the proper legal standards
4 were not applied in weighing the evidence and making the decision.
5 *Browner v. Secretary of Health and Human Services*, 839 F.2d 432,
6 433 (9th Cir.1987). Thus, if there is substantial evidence to
7 support the administrative findings, or if there is conflicting
8 evidence that will support a finding of either disability or
9 nondisability, the finding of the Commissioner is conclusive.
10 *Sprague v. Bowen*, 812 F.2d 1226, 1229-1230 (9th Cir.1987).

11 **ALJ'S FINDINGS**

12 At the outset, the ALJ found Plaintiff met DIB insurance
13 requirements through March 31, 2010 (Tr. 25, 27). At step one, he
14 found she did not engage in substantial gainful activity after
15 onset (Tr. 27). At steps two and three, he found she suffers from
16 plantar fasciitis of the left heel, mild diffuse osteopenia and
17 mild bilateral facet joint osteoarthropathy at L5-S1, mild
18 bilateral L4-5 and L5-S1 facet joint degenerative disease, and
19 obesity, impairments that are severe but do not alone or in
20 combination meet or medically equal a Listed impairment (Tr. 27-
21 28; 281-282). At steps four and five, he found plaintiff is unable
22 to perform past work, but can do other jobs, such as "table
23 worker, touch up screener, and sticker" (Tr. 32-33). Accordingly,
24 the ALJ found plaintiff was not disabled as defined by the Social
25 Security Act during the relevant period (Tr. 33).

26 **ISSUES**

27 Plaintiff alleges the Commissioner erred when he assessed
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1 medical and lay opinion evidence and her credibility. The
2 Commissioner responds that because the ALJ's determinations are
3 free of harmful legal error and supported by the evidence, the
4 Court should affirm.

5 DISCUSSION

6 A. Weighing medical evidence

7 In social security proceedings, the claimant must prove the
8 existence of a physical or mental impairment by providing medical
9 evidence consisting of signs, symptoms, and laboratory findings;
10 the claimant's own statement of symptoms alone will not suffice.
11 20 C.F.R. § 416.908. The effects of all symptoms must be evaluated
12 on the basis of a medically determinable impairment which can be
13 shown to be the cause of the symptoms. 20 C.F.R. § 416.929. Once
14 medical evidence of an underlying impairment has been shown,
15 medical findings are not required to support the alleged severity
16 of symptoms. *Bunnell v. Sullivan*, 947 F.2d 341, 345 (9th
17 Cir.1991).

18 A treating physician's opinion is given special weight
19 because of familiarity with the claimant and the claimant's
20 physical condition. *Fair v. Bowen*, 885 F.2d 597, 604-05 (9th Cir.
21 1989). However, the treating physician's opinion is not
22 "necessarily conclusive as to either a physical condition or the
23 ultimate issue of disability." *Magallanes v. Bowen*, 881 F.2d 747,
24 751 (9th Cir.1989)(citations omitted). More weight is given to a
25 treating physician than an examining physician. *Lester v. Chater*,
26 81 F.3d 821, 830 (9th Cir.1995). Correspondingly, more weight is
27 given to the opinions of treating and examining physicians than to
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1 nonexamining physicians. *Benecke v. Barnhart*, 379 F.3d 587, 592
2 (9th Cir.2004). If the treating or examining physician's opinions
3 are not contradicted, they can be rejected only with clear and
4 convincing reasons. *Lester*, 81 F.3d at 830. If contradicted, the
5 ALJ may reject an opinion if he states specific, legitimate
6 reasons that are supported by substantial evidence. See *Flaten v.*
7 *Secretary of Health and Human Serv.*, 44 F.3d 1435, 1463 (9th Cir.
8 1995).

9 In addition to the testimony of a nonexamining medical
10 advisor, the ALJ must have other evidence to support a decision to
11 reject the opinion of a treating physician, such as laboratory
12 test results, contrary reports from examining physicians, and
13 testimony from the claimant that was inconsistent with the
14 treating physician's opinion. *Magallanes v. Bowen*, 881 F.2d 747,
15 751-52 (9th Cir.1989); *Andrews v. Shalala*, 53 F.3d 1042-43 (9th
16 Cir.1995).

17 Plaintiff alleges the ALJ failed to give specific and
18 legitimate reasons for rejecting the contradicted opinions of
19 treating Dr. Lee (Tr.632-633), and of examiners Drs. Pradham and
20 Viravathana (ECF No. 10 at 9-12; Tr. 351-355, 560-565).

21 **B. Credibility**

22 To aid in weighing the conflicting medical evidence, the ALJ
23 evaluated plaintiff's credibility and found her less than fully
24 credible (Tr. 29-31). Credibility determinations bear on
25 evaluations of medical evidence when an ALJ is presented with
26 conflicting medical opinions or inconsistency between a claimant's
27 subjective complaints and diagnosed condition. See *Webb v.*
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1 *Barnhart*, 433 F.3d 683, 688 (9th Cir.2005).

2 It is the province of the ALJ to make credibility
3 determinations. *Andrews v. Shalala*, 53 F.3d 1035, 1039 (9th Cir.
4 1995). However, the ALJ's findings must be supported by specific
5 cogent reasons. *Rashad v. Sullivan*, 903 F.2d 1229, 1231 (9th Cir.
6 1990). Once the claimant produces medical evidence of an
7 underlying medical impairment, the ALJ may not discredit testimony
8 as to the severity of an impairment because it is unsupported by
9 medical evidence. *Reddick v. Chater*, 157 F.3d 715, 722 (9th Cir.
10 1998). Absent affirmative evidence of malingering, the ALJ's
11 reasons for rejecting the claimant's testimony must be "clear and
12 convincing." *Lester v. Chater*, 81 F.3d at 834. "General findings
13 are insufficient: rather the ALJ must identify what testimony not
14 credible and what evidence undermines the claimant's complaints."
15 *Id.*; *Dodrill v. Shalala*, 12 F.3d 915, 918 (9th Cir.1993).

16 The ALJ's reasons for finding Plaintiff less than credible
17 are specific, clear and convincing. See *Smolen v. Chater*, 80 F.3d
18 1273, 1281 (9th Cir. 1996). The ALJ notes the medical evidence
19 does not support Plaintiff's allegations. There are
20 inconsistencies between plaintiff's testimony and conduct. And,
21 Plaintiff may have a motivation for secondary gain (Tr. 29-31).

22 *Medical evidence is inconsistent with Plaintiff's testimony.*

23 The ALJ notes Dr. Brown testified Plaintiff's
24 electromyography study was negative. There is no evidence of a
25 fixed neuropathy or motor dysfunction. Dr. Brown opined
26 fibromyalgia is not established based on the claimant's clinical
27 features (Tr. 30-31). The ALJ observes Dr. Brown assessed an RFC
28 for the range of work "generally stated" in the ALJ's residual

1 functional capacity assessment (Tr. 31). MRI results in March and
2 June 2006 were negative or showed mild conditions, as the ALJ
3 points out (Tr. 29; 280-282). In April 2006, examining doctor
4 Edward Reisman, M.D., expressed concern Plaintiff's pain symptoms
5 were out of proportion to the examination findings (Tr. 29; 253-
6 254). In May 2007, examining doctor Sean To, M.D., assessed an RFC
7 for a range of medium work (Tr. 30; 468). As noted, Plaintiff
8 testified she experiences numbness, severe radiating pain, and
9 loses the use of her hands causing her to drop things. The ME
10 testified there is no evidence of radiculopathy, or of sensory or
11 motor neuropathy (Tr. 79). The ME is correct. The medical evidence
12 does not support Plaintiff's complaints. In October 2006, Dr.
13 Pradhan notes grip strength is 10-15 pounds in the right hand and
14 15 pounds in left; reflexes, function, and strength are all within
15 normal limits (Tr. 352-353). An EMG/NCS study in June 2008 was
16 normal. There was no evidence of peripheral neuropathy (Tr. 634-
17 635).

18 *Testimony is inconsistent with conduct and medical records,*
19 *and internally inconsistent.* Plaintiff testified she had very
20 limited functioning (Tr. 67). The ALJ accurately observes in
21 November 2006 [about eight months after onset], Jason Yang, M.D.,
22 a psychiatric consultative examiner, noted Plaintiff spends time
23 playing games, enjoys drawing, is independent in activities of
24 daily living, performs some household chores, runs errands, shops,
25 cooks, and spends time with family and friends. With respect to
26 psychological functioning, he assessed a GAF of 65 indicating some
27 mild symptoms or mild functional difficulties (Tr. 27, 31; 356-
28 362). This evidence alone may be insufficient. The ALJ also

1 observes Plaintiff has been able to run a study group for an hour
2 each week with seven other people for six months. This is
3 inconsistent with the severe degree of limitation alleged, i.e.,
4 the ability to only sit for 30 minutes and stand 10-15 minutes
5 (Tr. 31, 67, 77). Plaintiff has alleged severe pain ("10-13" on a
6 1-10 scale, Tr. 72), yet, as the ALJ points out, objective
7 findings have generally been minimal (Tr. 31).

8 The ALJ notes [before onset in March 2005] Plaintiff
9 complained to a provider in May 2004 that "the state [was] making
10 [her] go back to work" (Tr. 29, 303). She testified she needs "to
11 get some kind of independence," her parents "right now are
12 financially strapped," and they filed for bankruptcy (Tr. 78). The
13 ALJ observes this may point to a motivation for secondary gain
14 (Tr. 31).

15 The ALJ's reasons are clear, convincing, and fully supported
16 by the record. See *Thomas v. Barnhart*, 278 F.3d 947, 958-959 (9th
17 Cir.2002)(proper factors include inconsistencies in plaintiff's
18 statements, inconsistencies between statements and conduct, and
19 extent of daily activities). Although lack of medical evidence
20 cannot form the sole basis for discounting pain testimony, it is a
21 factor the ALJ can consider when weighing a claimant's
22 credibility. See *Burch v. Barnhart*, 400 F.3d 676, 681 (9th Cir.
23 2005). The ALJ's adverse credibility determination is further
24 supported by evidence suggesting that Plaintiff was motivated by
25 secondary gain, i.e., was malingering. Affirmative evidence of
26 malingering supports an adverse credibility finding. See *Robbins*
27 *v. Soc. Sec. Admin.*, 466 F.3d 880, 883 (9th Cir.2006). Plaintiff's
28 statements reasonably support an inference that Plaintiff was not

1 motivated to work as opposed to collect benefits.

2 **C. Lay opinion evidence**

3 The ALJ gave specific reasons, germane to the witness, for
4 giving little weight to the lay witness testimony of Plaintiff's
5 mother, Donna Lockerbie. See *Dodrill v. Shalala*, 12 F.3d 915, 919
6 (9th Cir.1993). The ALJ notes Ms. Lockerbie testified she helps
7 Plaintiff get into and out of bed. Ms. Lockerbie testified she
8 weighs 105 pounds. Plaintiff testified her mother is 77 years old.
9 Plaintiff, on the other hand weighs 220 pounds and is 62 inches
10 tall. The ALJ found Ms. Lockerbie's testimony problematic in that
11 it also may have been motivated by financial problems. As noted,
12 Plaintiff testified her parents filed for bankruptcy (Tr. 78).
13 More important, the ALJ found it problematic that the petite Ms.
14 Lockerbie would be able to assist her significantly heavier
15 daughter with getting into and out of bed (Tr. 31-32). Both
16 reasons are germane to the witness and supported by substantial
17 evidence. The ALJ properly gave little weight to the lay witness
18 testimony.

19 **D. Medical opinion evidence**

20 Treating doctor Michael Lee, M.D., opined in May 2008
21 Plaintiff could perform less than sedentary work. He opined she
22 could lift less than 10 pounds occasionally, stand and walk less
23 than 2 hours out of 8, and sit less than 2 hours out of 8 *for less*
24 *than 15 minutes a time*. He opined she needed a cane or walker in
25 the house, and a walker when outside, to prevent falling (Tr. 632-
26 633)(italics added).

27 The ALJ rejected these contradicted dire limitations because
28 Plaintiff testified she could do more than the treating doctor

1 assessed. Plaintiff testified she is able to sit for 30 minutes
2 (Tr. 67). The ALJ considered the medical expert's opinion. Dr.
3 Brown disagreed with Dr. Lee's RFC, opining Lee's opinion is
4 disproportional to the medical evidence (Tr. 31). The ALJ notes
5 Dr. Brown had access to the most recent records.

6 The ALJ's reasoning that Dr. Lee's opinion is inconsistent
7 with other medical evidence and with Plaintiff's own testimony
8 about her activity level amounts to "'specific and legitimate
9 reasons' supported by substantial evidence in the record." See
10 *Rollins v. Massanari*, 261 F.3d 853, 856 (9th Cir.2001)(quoting
11 *Reddick v. Chater*, 157 F.3d 715, 720 (9th Cir.1998)).

12 Plaintiff creatively asserts the ALJ should have accepted
13 examining doctor Rita Pradhan, M.D., 's fibromyalgia diagnosis
14 because she found plaintiff had 11 tender points "and other
15 doctors found tenderness to satisfy them," rendering the ME's
16 opinions insubstantial (ECF No. 10 at 12).

17 Dr. Pradhan examined Plaintiff on October 30, 2006 (Tr. 351-
18 355). The ALJ notes Dr. Pradhan opined in part that Plaintiff
19 could lift 20 pounds occasionally, 10 pounds frequently, stand or
20 walk four hours out of 8, and sit without limitations (Tr. 30).
21 With respect to fibromyalgia, Dr. Pradhan said

22 "History of low back pain with associated myalgias or
23 muscle spasm: There is decreased range of motion of the
24 lumbar spine. Straight leg raising is also positive. The
claimant seems to have also associated fibromyalgia with
11-point discrimination points."

25 (Tr. 354).

26 Dr. Brown testified

27 "I didn't see that established, at least by the clinical
28 features of fibromyalgia. . . The Work Comp injury sites
[in 1997 and 2002, Tr. 79], and her pre-injury status,
even with her low back pain, were pretty well established

1 in the medical record. It would be a little unusual to see
2 a fibromyalgia case that would have chronic establishment
3 of those very sites and now this paraesthesia, carpal
4 tunnel, facet arthropathy, and then develop fibromyalgia.
5 It would be a little unusual, and it's one of the exclusions
6 for fibromyalgia when you have pre-existing conditions."

7 (Tr. 88).

8 Significantly, Plaintiff's treatment providers at USC have
9 listed fibromyalgia as a "rule out" diagnosis. See Tr. 494 ("rule
10 out RA, Fibromylagia," August 6, 2007); same, November 2007 (Tr.
11 628, 630).

12 The ALJ's reasons for rejecting some of Dr. Pradhan's
13 contradicted opinions are specific, legitimate and supported by
14 substantial evidence. See *Lester*, 81 F.3d at 821. An ALJ is not
15 required to credit an opinion that is conclusory, brief, and
16 unsupported by clinical findings. *Matney v. Sullivan*, 981 F.2d
17 1016, 1019 (9th Cir. 1992).

18 Nibonth Viravathana, M.D., examined Plaintiff in June of 2008
19 (Tr. 554-557). Testing revealed Plaintiff's right hand grip
20 strength is ten pounds and left is 15 pounds (Tr. 556). Dr.
21 Viravathana assessed an RFC for a range of sedentary work. He
22 assessed no manipulative limitations, opined Plaintiff could lift
23 ten pounds frequently, stand and walk 2 hours out of 8, and sit
24 without limitations (Tr. 30, 556-557). He noted complaints of
25 fibromyalgia, diffuse joint pain, thyroid dysfunction, decreased
26 sensation in all extremities, migraine headaches, and depression
27 (Tr. 554). He diagnosed fibromyalgia, bilateral carpal tunnel
28 syndrome, and diffuse joint pain (Tr. 556).

29 In October 2008, ER nurse practitioner Louis Salazar listed a
30 preliminary diagnosis of fibromyalgia and right knee sprain (Tr.
31 651); however, a nurse practitioner is not an acceptable source

1 for a diagnosis.

2 As noted, the ALJ found Dr. Brown's opinion persuasive
3 because he conducted the most thorough and current review of the
4 record. Dr. Brown's opinion is consistent with the bulk of the
5 medical evidence. And, the ALJ notes, given Dr. Brown's expertise
6 in rheumatology, his opinion is entitled to deference with respect
7 to alleged fibromyalgia (Tr. 31).

8 Similarly, Plaintiff alleges the ALJ should have assessed a
9 more restrictive RFC with respect to her ability to walk. The ALJ
10 found Plaintiff can stand and walk 4 hours out of 8 (Tr. 28). The
11 medical evidence is contradictory.

12 The ALJ is responsible for reviewing the evidence and
13 resolving conflicts or ambiguities in testimony. *Magallanes v.*
14 *Bowen*, 881 F.2d 747, 751 (9th Cir. 1989). It is the role of the
15 trier of fact, not this court, to resolve conflicts in evidence.
16 *Richardson*, 402 U.S. at 400. The court has a limited role in
17 determining whether the ALJ's decision is supported by substantial
18 evidence and may not substitute its own judgment for that of the
19 ALJ, even if it might justifiably have reached a different result
20 upon de novo review. 42 U.S.C. § 405 (g).

21 The ALJ's assessment of the medical and lay evidence and of
22 plaintiff's credibility are supported by the record and free of
23 legal error.

24 CONCLUSION

25 Having reviewed the record and the ALJ's conclusions, this
26 court finds that the ALJ's decision is free of legal error and
27 supported by substantial evidence..

28 IT IS ORDERED:

ORDER GRANTING DEFENDANT'S MOTION
FOR SUMMARY JUDGMENT

The District Court Executive is directed to file this Order, provide copies to counsel for Plaintiff and Defendant, enter judgment in favor of Defendant, and **CLOSE** this file.

S/ James P. Hutton
JAMES P. HUTTON
UNITED STATES MAGISTRATE JUDGE